

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 482 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed : YES  
to see the judgements?
  2. To be referred to the Reporter or not? : YES
  3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
  4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge? : NO

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VINODBHAI SHIVABHAI

Versus

EMPLOYEES STATE INSURANCE CO.LTD.  
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Appearance:

MS ASHA H GUPTA for Petitioner  
MR SP HASURKAR for Respondent No. 1  
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CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 17/07/2000

ORAL JUDGEMENT

1. This appeal u/S. 82 of the Employees State Insurance Act, 1948 (for short 'the ESI Act') has been directed against impugned judgment and order dated 18/10/1996 rendered by the E.S.I. Court, Ahmedabad in

Second Appeal No. 78 of 1995.

2. It is not in dispute that the appellant was on duty as a Cotton Feeder when he sustained employment injury to his right hand resulting into amputation upto the shoulder joint. The E.S.I. Court awarded 90% disability, whereas the appellant claimed 100% disability. The stages prior to the decision of the Insurance Court would indicate that the medical board assessed 80% disability. Dealing with this aspect of the matter, the E.S.I. Court laid stress on the fact that the appellant's right hand was amputated from below the shoulder and, therefore, it would mean as if the appellant had lost whole of his right hand. He, therefore, referred to item no. 7 of Schedule No.II where 90% disability has been laid down when one hand is lost. That is what the E.S.I. Court has awarded.

3. This appeal was placed for final hearing in view of the order passed by this Court to the effect that printing and paper book were dispensed with and the matter should be fixed for final hearing on 12/11/1997. The office note also indicates that the respondent was served with the summons by direct service, but no body filed appearance. However, for the abundant caution this Court directed the matter to be placed by naming one of the advocates usually appearing for the E.S.I. Corporation. Name of Mr. S.P. Hasurkar was notified as per the order dated 3/7/2000 passed by this Court.

4. Today when the matter is called out neither appellant nor respondent is present. However, Smt. Ashaben Gupta, learned advocate, who is present in other matter, has shown her willingness to argue the matter since at the initiation of the First Appeal she appeared, although her client had taken away papers from her.

5. The substantial question of law that is involved in this appeal is whether loss of one hand would mean permanent total disablement in the facts and circumstances of the present case. The answer to such question would be in the affirmative in view of the following circumstances.

6. At the outset, provision contained in section 2 (15-B) of the ESI Act might be reproduced :-

"permanent total disablement" means such disablement of a permanent nature as incapacitates an employee for all work which he

was capable of performing at the time of the accident resulting in such disablement :

Provided that permanent total disablement shall be deemed to result from every injury specified in Part I of the Second Schedule or from any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to one hundred percent, or more"

Part I of the Second Schedule to the Act referable to the above provision deals with list of injuries which deem to result in permanent total disablement. Section 2 (15-A) of the ESI Act reads :

"(15-A) "permanent partial disablement" means such disablement of a permanent nature, as reduces the earning capacity of an employee in every employment which he was capable of undertaking at the time of the accident resulting in the disablement :

Provided that every injury specified in Part II of the Second Schedule shall be deemed to result in permanent partial disablement."

Part II of the Second Schedule to the Act referable to section 2 (15-A) deals with list of injuries which deem to result in permanent partial disablement. There item no. 7 states about amputation through shoulder joint and the percentage of loss of earning capacity is shown to be 90%. The E.S.I. Court referred to this item to raise percentage of disability allowed by the medical board from 80% to 90%. It may be noted from the aforesaid definition that permanent total disablement means such disablement of a permanent nature as incapacitates an employee for all work which he was capable of performing at the time of accident resulting such disablement. The proviso to the aforesaid provision lays down illustrations of permanent total disablement. Likewise proviso to the previous definition of permanent partial disablement [ section 2 (15-A) ] lays down illustrations to permanent partial disablement. Now these illustrations, submits the learned counsel canvassing the cause of the appellant, are guidelines and the main provision would stand unaffected. For example, if the

nature of work, the insured employee has been carrying on, is such as would make him totally incapable of following that work, inspite of the fact that the case would be covered by the proviso to section 2 (15-A) relating to permanent partial disablement, it might fall into the main provision of section 2 (15-B) of the ESI Act. In support of this submission learned advocate has referred to the decision in the case of Pratap Narain Singh v. Shrinivas reported in AIR 1976 S.C. p.222. Considering similar provisions in the Workmen's Compensation Act the Apex Court has held that when there was amputation of left hand above elbow of a carpenter he could not work with one hand and, therefore, the disablement was total and not partial. Para. 5 of the citation might be reproduced :

"5. The expression "total disablement" has been defined in Section 2 (1)(1) of the Act as follows :

"(1) "total disablement" means such disablement, whether of a temporary or permanent nature, as incapacitates workman for all work which he was capable of performing at the time of the accident resulting in such disablement."

It has not been disputed before us that the injury was of such a nature as to cause permanent disablement to the respondent, and the question for consideration is whether the disablement incapacitated the respondent for all work which he was capable of performing at the time of the accident. The Commissioner has examined the question and recorded his finding as follows :-

"The injured workman in this case is carpenter by profession ..... By loss of the left hand above the elbow, he has evidently been rendered unfit for the work of carpenter as the work of carpentry cannot be done by one hand only."

This is obviously a reasonable and correct finding. Counsel for the appellant has not been able to assail it on any ground and it does not require to be corrected in this appeal."

7. It might be visualised from the above observations that as the carpenter could not do his carpentry work at all, it was a case of permanent

disablement despite the fact that the schedule indicated 90% disability for loss of one hand. Thus, permanent total disablement is to be judged from the nature of the work which would render him helpless to render the job. It would be deemed to be total and not partial disablement.

8. It is not in dispute that the present appellant has lost the job on account of aforesaid disability. It has also not been in dispute that he would not be in a position to attend to the work as a Cotton Feeder any-where else. There is no evidence to indicate that he would have been able to carry on with the work as a Cotton Feeder even after loosing one hand. The learned advocate has demonstrated the work by saying that firstly the cotton bales are to be opened by removing the steel strips tied around the bale. That would obviously require both the hands. After the cotton is taken out from the bale the cotton is to be smoothened or broken and put on lattice. This work would also require both the hands. Thereafter, the smoothened cotton is fed into the machine with both the hands. Now comparing this work with the carpentry work, it would clearly appear that by no stretch of imagination such work could ever be attended to by one hand by a person working as a Cotton Feeder. It would, therefore, clearly appear that such disablement would be total permanent disablement within the meaning of the definition as reproduced hereinabove inspite of the fact that ordinarily it would be 90% permanent partial disablement.

The judgment and order impugned in this appeal will accordingly stand partially set aside directing the disablement to be 100% instead of 90% in the present case. Cost shall be on the respondent in so far as present appeal is concerned. Order accordingly.

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PVR.